Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as amended	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

REPLY COMMENTS OF FREE PRESS

Free Press,[1] by its attorneys the Institute for Public Representation, respectfully submits these Reply Comments in response to Comments filed by AT&T and Verizon pursuant to the Federal Communications Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter. The NPRM sought comments on §621(a)(1), which prohibits local franchising authorities ("LFAs") from unreasonably denying franchises.

AT&T and Verizon wrongly argue that the First Amendment requires the FCC to place additional, significant constraints on the routine, long-established cable franchising process. *See, e.g.,* Verizon Comments at 10; AT&T Comments at 9. These Reply Comments rebut Verizon and AT&T's specific contentions regarding the First Amendment's application to this proceeding. First, the public has significant countervailing First Amendment interests which AT&T and Verizon

[1] Free Press is a national, nonpartisan organization working to increase informed public participation in media policy debates. It seeks to generate policies producing a more competitive and public interest-oriented media system, enabling the expression of more diversity of opinion, and increasing the quality of information available to everyday people.

completely ignore. Second, courts use intermediate scrutiny, not the prior restraint test, to assess the constitutionality of LFA agreement provisions. Finally, requiring telephone franchisees to submit cable franchise applications serves several substantial governmental interests. As all of their First Amendment arguments fail, the FCC should not restrict cable franchising in the manner urged by AT&T or Verizon.[2]

I. The First Amendment Protects Community Members' Speech Interests, Not Just the Interests of Video Programmers.

As a threshold matter, citizens have countervailing, and privileged, speech interests. Verizon notes that the First Amendment extends to cover the speech interests of cable operators,[3] but nowhere in their comments do either Verizon or AT&T recognize that members of the community also have protected speech interests. Verizon Comments at 17.

Indeed, as the Supreme Court observed in assessing the First Amendment claims of cable operators, "there are important First Amendment interests on the other side as well." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 226-27 (1997) (Breyer, J., concurring) ("*Turner II*") (rejecting a First Amendment challenge to a

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[2] AT&T suggests the FCC follow the canon of constitutional avoidance in their favor, AT&T Comments at 9, but, as these comments show, the constitutional claims are baseless. Because there is no constitutional issue to avoid, the canon does not apply here.

[3] Verizon claims the First Amendment rights of cable operators, but refuses to identify itself as one. Although Verizon states, "[i]t is well established that the First Amendment protects *cable companies'* right to offer video programming services," Verizon Comments at 17 (emphasis added), Verizon urges the FCC to find that it is ***not*** a cable system. *Id.* at 82.

federal statute requiring cable operators to carry local broadcast stations). These "First Amendment interests of cable viewers cannot be left out of the equation for permissible regulation of cable companies." *Cmty. Commc'ns Co.* v. *Boulder*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981) (relying on Supreme Court precedents across a range of speech categories that uphold the rights of receivers of information). Moreover, in *Red Lion*, the Supreme Court clearly stated that the public's speech rights are paramount to the speech rights of those who merely control communications infrastructure. *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.")

The Supreme Court recognized that citizens have a First Amendment interest in receiving "access to a multiplicity of information sources." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 663 (1994) ("*Turner I*"); *see also Central Telecommc'n, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711, 717 (8th Cir. 1986) (recognizing the "First Amendment interests of the viewing public in the greatest variety of programming obtainable" through cable). The public also has a First Amendment interest in "public discussion and informed deliberation, which … democratic government presupposes and the First Amendment seeks to achieve." *Turner II*, 520 U.S. at 227 (Breyer, J., concurring). Verizon and AT&T's comments fail to consider these First Amendment interests of the public.

Not only do AT&T and Verizon's arguments ignore the speech interests of citizens, the arguments also ignore the purpose of the First Amendment. The First

Amendment primarily seeks to facilitate citizens' political speech, public discussions, and informed deliberations.[4] Verizon and AT&T fail to demonstrate how local franchising undermines any of these purposes. Neither provides any evidence that LFAs have the intent, or that the franchising process has the effect, of burdening Verizon or AT&T's speech. Nor do they provide evidence or a plausible argument that LFAs are targeting their speech based on disapproval of content or viewpoint.[5] In fact, Verizon and AT&T have vast resources, and the legal ability, allowing them to exercise their First Amendment rights through nearly infinite means.[6] AT&T and Verizon cannot show that cable franchising undermines First Amendment purposes, because it does not suppress cable operators' content, it promotes citizens' First Amendment interests, and, as Part III discusses, it serves substantial governmental interests, as well.

II. LFA Agreements Receive Mere Intermediate Scrutiny and are Not Prior Restraints on Speech.

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[4] *See, e.g.*, *Turner II*, 522 U.S. at 227 (Breyer, J., concurring) (citing *Whitney* v. *California*, 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Red Lion*, 395 U.S. at 390; *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)). *See also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20 (1971); Cass R. Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255 (1992).

[5] *Cf. FCC* v. *Pacifica Found.*, 438 U.S. 726, 746 (1978) ("If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content--or even to the fact that it satirized contemporary attitudes about four-letter words --First Amendment protection might be required.")

[6] The multi-billion dollar companies engage in protected speech in myriad ways, in virtually any locality. They advertise on numerous media, from billboards to broadcast to wireless and wireline telephony, and they may produce programming, fund advocacy groups, or give campaign contributions.

Not only do Verizon and AT&T wrongly assume that their speech interests trump those of other community members, but Verizon also incorrectly claims that cable franchising is a prior restraint on speech requiring "heightened scrutiny" (without specifying which level of scrutiny). Verizon Comments at 10, 18. Verizon bases its argument on cases examining the constitutionality of pamphlet and parade regulations, *id.* at 18, and cites no support from any cases involving LFAs. Indeed, in several pages of argument, Verizon does not refer to a single cable or telecommunications case to support its prior restraint argument. *Cf. Turner I*, 512 U.S. at 639 (noting "the unique physical characteristics of cable transmission should [not] be ignored when determining the constitutionality of regulations affecting cable speech.")

Verizon completely ignores the voluminous case law in which courts apply mere intermediate scrutiny, not the test for prior restraints, to First Amendment challenges of LFA requirements. When applying intermediate scrutiny to LFA agreements, numerous courts in at least four circuits have upheld the constitutionality of requirements commonly found in franchising agreements under intermediate scrutiny.[7]

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[7] *Time Warner Ent. Co.* v. *FCC*, 93 F.3d 957, 966-67, 971-73 (D.C.Cir. 1996) (applying intermediate scrutiny and upholding the Cable Act's rate regulation and PEG access provisions); *Chicago Cable Commc'ns* v. *Chicago Cable Comm'n*, 879 F.2d 1540, 1549-1550 (7th Cir. 1989) (applying intermediate scrutiny and upholding local origination programming requirement); *Comcast of California II, LLC* v. *City of San Jose*, 286 F.Supp.2d 1241, 1252 (N.D.Cal. 2003) (applying intermediate scrutiny and determining that the City of San Jose's Request for a Renewal Proposal, which required that the cable operator provide up to ten PEG access channels and contained related equipment, location, and management provisions,

Even assuming for purposes of argument that franchising agreements were prior restraints, Verizon, in effect, admits that the agreements are constitutional. A prior restraint is not constitutionally suspect if it contains extensive restrictions on the discretion of local authorities. *See* Verizon Comments at 18 (citing *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969)). Here, "[t]he Cable Acts contain extensive restrictions on the discretion of local authorities to award franchises." *Time Warner Ent. Co.* v. *FCC*, 93 F.3d 957, 980 (D.C.Cir. 1996). Verizon even admits this.[8] Therefore, the Commission need not, and should not, issue additional regulations to limit LFA discretion.

III. The Franchising Process Serves Several Substantial Governmental Interests.

AT&T and Verizon also suggest that local cable franchising would fail intermediate scrutiny. They state that the franchising process "serve[s] no substantial government interest" when companies subject to the franchising process

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did not violate the First Amendment); and *Telesat Cablevision, Inc.* v. *City of Riviera Beach*, 773 F.Supp. 383, 399-413 (S.D.Fla. 1991) (applying intermediate scrutiny and upholding all aspects of the City's franchising ordinance including, among other items, the anti-redlining provisions, franchise fee, and requirements to demonstrate financial capability and feasibility). *Cf. Warner Cable Commc'ns, Inc.* v. *City of Niceville,* 911 F.2d 634, 640 (11th Cir. 1990) (finding cable operator had no speech interest in maintaining its monopoly and denying its requested relief to have City's bond ordinance struck down); and *Paragould Cablevision, Inc.* v. *City of Paragould*, 739 F.Supp. 1314, 1322 (E.D. Ark. 1990), *aff'd on other grounds* 930 F.2d 1310 (8th Cir. 1991) (finding provision requiring cable operator to engage in negotiation and modification of its franchise agreement with the City if cable operator chose to air advertisements on its cable networks did not violate the First Amendment because the provision did not outlaw or curb protected speech).

[8] "Congress provided LFAs with a *limited* set of factors that they are permitted to consider…thus expressly delimiting the grounds on which an LFA may refuse to grant a competitive franchise. These factors…necessarily cabin the discretion of LFAs." Verizon Comments at 9 (citations omitted, emphasis added).

already use the public rights-of-way. AT&T Comments at 9; Verizon Comments at 10, 21.[9] This argument erroneously assumes that regulation of the public rights-of-way is the only governmental interest served by the franchising process. In reality, however, the franchising process and common provisions found in franchise agreements serve several substantial governmental interests, in addition to management of the public rights-of-way.[10]

Franchise provisions contain anti-redlining provisions, which serve numerous substantial governmental interests. Local governments have a substantial interest in preventing discrimination, whether it is based on financial status, race, or other grounds. Anti-redlining provisions ensure that all members of the community have access to the programming and services that cable offers.[11] *See Turner I*, 512 U.S. at 663. Non-discriminatory access to the same information sources gives all citizens, some of whom operators otherwise would not reach, the ability to participate equally in informed deliberations. Certainly local governments have a substantial interest in assuring that their electorate is equally informed.

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[9] Demonstrating the existence of a substantial governmental interest is part of the test for constitutionality under intermediate scrutiny. *U.S.* v. *O'Brien*, 391 U.S. 367, 377 (1968).

[10] As other commenters have noted, localities also have an interest in maintaining control over construction specific to laying fiber for video services. *See, e.g.,* Comcast Comments at 41.

[11] Congress unambiguously directed franchise authorities "to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C §541(a)(3).

LFA agreements also often require cable operators to provide channels for public, educational, and governmental use ("PEG"), and to provide for their further support. PEG access channels serve additional substantial governmental interests. PEG access helps foster an informed electorate by providing the programming through which citizens gain knowledge about their community and their elected officials.[12] In *Time Warner*, the D.C. Circuit agreed with the district court that PEG access advances substantial government interests, such as "affording speakers with lesser market appeal access to the nation's most pervasive video distribution technology," and "[e]nabling a broad range of speakers to reach a television audience that otherwise would never hear them." *Daniels Cablevision, Inc.* v. *United States*, 835 F.Supp. 1, 6-7 (D.D.C.1993), *aff'd in part, rev'd in part on other grounds by Time Warner*, 93 F.3d at 971.

Similarly, in holding that a franchise agreement's local origination requirement was constitutional, the Seventh Circuit identified substantial interests served by such provisions. They serve to "preserve free, locally oriented television," "provide an outlet for community expression and choice of programming," "improve communications between the citizens and the City," encourage localism, and even provide jobs for residents. *Chicago Cable Commc'ns* v. *Chicago Cable Comm'n,* 879 F.2d 1540, 1549-50 (7th Cir. 1989). The court also noted this type of programming "increase[es] the number of outlets for community self-expression and augment[s]

[12] PEG access provisions "assur[e] that the public has access to a multiplicity of information sources" by requiring the cable operator provide programs it otherwise would not have an incentive to provide. *Cf. Turner I,* 512 U.S. at 663.

the public's choice of programs." *Id.* (quoting *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 668 (1972)).[13]

Finally, franchise fees, and the franchising process generally, supports local governments' substantial interest in governing their own communities. LFA agreements typically include franchise fees, which cities use for a variety of important public purposes, including promoting diverse local speech interests by supporting PEG channels.[14]

CONCLUSION

Verizon and AT&T advance faulty First Amendment arguments that ignore the valid First Amendment interests of other citizens, that mischaracterize routine franchising agreements as prior restraints, and that trivialize or ignore the substantial interests of local governments to advance those speech interests and other non-speech interests. Although the First Amendment provides some limits on LFAs' franchising authority, such as forbidding them from censoring or stifling political speech, it does not demand FCC action, as Verizon and AT&T maintain. The First Amendment does not require the Commission to further restrict the cable franchising process.

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[13] Other commenters in this rulemaking have also explained some of the many interests that the franchising process serves. *See, e.g.*, NATOA et. al Comments at 32-35 (discussing the importance of anti-redlining provisions, PEG access and I-Net requirements).

[14] Franchise fees also compensate the community for its grant to a private entity an interest in public property. *See Denver Area Educ. Telecommc'ns Consortium, Inc.* v. *FCC*, 518 U.S. 727, 734 (1996) (noting the "consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way"); *see also* NATOA et. al Comments at 38-39.

Respectfully submitted,

/s/

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